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(1)

Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

THE STATE OF TEXAS,
Petitioner,

v.

DANIEL WAYNE WALKER,
Respondent.

Petition for Writ of Certiorari To The Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

(1) Has the Court of Criminal Appeals misapplied the federal sufficiency doctrine of *Jackson v. Virginia, Burks v. United States,* and *Green v. Massey* by measuring the sufficiency of the evidence against the application paragraph of the jury charge?

PARTIES TO THIS PROCEEDING

The names of the parties to this proceeding are as follows:

1. Jack Skeen, Jr., Criminal District Attorney of Smith County, Texas; Amy R. Blalock, Michael J. Sandlin, and Rex Thompson, Assistant Criminal District Attorneys of Smith County, Texas, 403 Smith County Courthouse, Tyler, Texas 75702 (Petitioner)
2. Daniel Wayne Walker (pro se), 2726 Cecil, Tyler, Texas 75702 (Respondent)

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THE STATE OF TEXAS,
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v.

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Petition for Writ of Certiorari To The Court of Criminal Appeals of Texas

PETITION FOR WRIT OF CERTIORARI

Petitioner, the State of Texas, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Criminal Appeals for the State of Texas entered in this proceeding on September 18, 1991.

OPINIONS BELOW

The opinions of the Court of Appeals for the Twelfth District of Texas and the Court of Criminal Appeals of Texas are reprinted in the appendix to this petition. Neither opinion has been released for publication.

STATEMENT OF JURISDICTION

The opinions and judgment of the Court of Criminal Appeals were entered on September 18, 1991. Timely motions for rehearing of that decision were overruled on October 23, 1991.

Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a). This Response is timely filed pursuant to Rule 13, United States Supreme Court Rules.

CONSTITUTIONAL PROVISION INVOLVED IN THE CASE

The due process clause of the Fourteenth Amendment is implicated in this case.

STATEMENT OF THE CASE

A. Statement of the Facts

DANIEL WAYNE WALKER was charged by indictment with the offense of burglary of a building alleged to have been committed on or about September 4, 1986, in Smith County, Texas. He was found guilty in a trial by jury. The Court assessed punishment at forty (40) years' confinement in the Texas Department of Corrections.

The Appellant did not testify at this trial. The evidence adduced at trial establishes that on September 4, 1986, at 1:38 a.m. the K-Mart store located in Tyler, Texas, was forcibly entered through the glass doors which led to the garden center. Twelve guns, two televisions, and a case of antifreeze had been taken from the K-Mart store.

The television sets, antifreeze and three of the rifles were found abandoned in the garden center area. Two distinct sets of footprints were found leading away from the scene. The offenders' trial led officers to four guns which had been ditched in a wooded area. No fingerprints were obtainable from the shattered glass door which was the point of entry. Three useable prints were lifted from the larger of the two televisions found immediately outside the K-Mart store. The investigating detective received an

anonymous tip implicating the Appellant in the crime. The fingerprints from the television set compared positively with those of the Appellant. The Appellant's address revealed that he lived in close proximity to the K-Mart store.

When arrested, the Appellant lied about his identity. Although he was advised that he had been arrested for burglary of a building, he was not told with *which* specific burglary he was charged with; however, upon arrival at the jail, he advised another inmate, "they got me in here on the burglary of K-Mart up north." These were circumstances from which the jury could have inferred the Appellant's guilt.

Not only did the fingerprints positively tie the Appellant to the burglary of K-Mart, but his actions upon apprehension indicate knowledge of the commission of the offense. No evidence was introduced which would establish that he was merely a K-Mart shopper.

The charge to the jury stated: ". . . in case you have a reasonable doubt as to the defendant's guilt after considering all the evidence before you, *and these instructions,* you will acquit him." (Emphasis ours.) Additionally, the charge stated: ". . . you are bound to receive the law from the Court, which is herein given you, and be governed thereby."

On page 5 of the charge, the application paragraph was provided to the jury, stating:

> "Now if you find from the evidence beyond a reasonable doubt that on or about the 4th day of September, 1986, in Smith County, Texas, the defendant DANIEL WAYNE WALKER, did then and there, intentionally or knowingly, without the effective con-

> sent of WILLIAM PARKS, the owner thereof, enter a building not then and there open to the public, with intent to commit theft, then you will find the defendant guilty as charged."

This charge was consistent with § 7.01(c) of the Texas Penal Code which provides that a "party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice."

Additionally, on page 4 of the charge, an abstract charge on the law of the parties was given to the jury, reading:

> "All persons are parties to an offense who are guilty of acting together in the commission of an offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both."

The State made it clear from the beginning of the trial that it intended to rely on this theory of liability. The prosecutor stated to the jury in his opening statement that at least two individuals were involved in the burglary at K-Mart. In his opening argument, the prosecutor told the jury to look carefully at the Court's charge where it talked about parties to an offense. He continued:

> "I believe the evidence has shown that he [Respondent] committed (sic) that offense and he did it with another. There was at least two people involved in that offense, . . ."

In Respondent's closing arguments, his attorney stated to the jury:

> ". . . They had an opportunity to get the blood from Ray Charles and prove that he did it. They didn't. He is not even under arrest, . . .

> They know Ray Charles did it and they make out like Daniel [Respondent] was the one that was with him."

It is apparent from reading the prosecutor's opening statement, and the prosecutor's and Appellant's jury arguments, that the theory of law parties was relied on and it was before the jury.

B. Course of Proceedings and Disposition in the Courts Below

The Court of Appeals for the 12th District of Texas reversed the Respondent's conviction and ordered an acquittal on May 12, 1989 (Opinion attached as Appendix "A"). The Court of Criminal Appeals granted the State's Petition for Discretionary Review on August 30, 1989. The Court of Criminal Appeals affirmed the judgment of the Court of Appeals in an opinion delivered on September 18, 1991 (Opinion attached as Appendix "B"). The Court of Criminal Appeals denied the State's Motion for Rehearing on October 23, 1991.

REASONS FOR GRANTING THE WRIT

The Court of Criminal Appeals held that, since the law of the parties was not included in the application paragraph of the jury charge, sufficiency of the evidence must be measured against the application paragraph and not against the charge in its entirety. The Court of Criminal Appeals also held that the evidence is insufficient to support the conviction when viewed in light of the application paragraph of the charge. This decision was based on the Court of Criminal Appeals decisions in *Jones v. State,* 815 S.W.2d 667 (Tex. Cr. App. 1991, reh'g den.) and *Garrett v. State,* 749 S.W.2d 784 (Tex. Cr. App. 1986).

The Court of Criminal Appeals asserts that the holdings in these cases are simply an application of the federal sufficiency doctrine enunciated in *Jackson v. Virginia,* 443 U.S. 307 (1979), *Burks v. United States,* 437 U.S. 1 (1978), and *Greene v. Massey,* 437 U.S. 19 (1978). The Court of Criminal Appeals' reliance on federal sufficiency doctrine is underscored by the remedy the Court ordered.[1]

The Court of Criminal Appeals, however, misapplied federal doctrine. The federal courts resolutely maintain that the Garrett-Jones doctrine is foreign to federal constitutional law.[2] The dramatic difference between the Court of Criminal Appeals' and the federal courts' interpretation of *Jackson, Burks* and *Greene* is most apparent in the Fifth Circuit's opinion in *Brown v. Collins,* 937 F.2d 175 (5th Cir. 1991).

In *Brown,* the defendant had been convicted in state court for aggravated robbery, which requires proof that the defendant committed the robbery and used or exhibited

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1. The Texas remedy for an appellate finding of insufficient evidence has always been a remand for a *new* trial. *See,* e.g., *Colunga v. State,* 527 S.W.2d 285 (Tex. Cr. App. 1975); *Andrews v. State,* 436 S.W.2d 546 (Tex. Cr. App. 1968); *Whitehead v. State,* 162 Tex. Crim. 507, 286 S.W.2d 947 (1956); *Brock v. State,* 162 Tex. Crim. 337, 285 S.W.2d 745 (1956); *Elizabeth v. State,* 27 Tex. 329 (1863). Federal insufficiency doctrine requires a judgment of "acquittal". *Banks, supra* 18. The fact that the State and federal insufficiency remedies differ and that the Court of Criminal Appeals has been empploying the *federal* remedy underscores the Court of Criminal Appeals' reliance on federal doctrine. The State court opinions cited federal sufficiency cases and neither opinion clearly stated that it was relying exclusively on state law. Thus, it must be presumed that the Court's opinion rested on federal law. *Michigan v. Long,* 463 U.S. 1032, 1042 (1983).

2. See, e.g., *Brown v. Collins,* 937 F.2d 175 (5th Cir. 1991); *United States v. Schwartz,* 889 F.2d 243 (3rd Cir. 1990); *United States v. Luster,* 896 F.2d 1122 (8th Cir. 1990); *United States v. Clizer,* 464 F.2d 121 (9th Cir. 1972); *United States v. Carlson,* 561 F.2d 105 (1st Cir. 1977); *Payne v. Janasz,* 711 F.2d 1305 (6th Cir. 1983).

a deadly weapon. *Supra* at 181. The State conceded that there was no evidence that Brown had personally carried a gun, and that Brown had merely been the get-away driver. *Supra* at 177. As in this case, the State sought to impose liability under the law of parties pursuant to § 7.01 (c) of the Texas Penal Code. The jury was given an abstract charge on the law of parties. The application paragraph, however, appeared to require a finding that the defendant had personally carried a weapon. The jury returned a guilty verdict.

After exhausting his state remedies, Brown sought review in the federal courts. Brown argued that the federal sufficiency doctrine required that the evidence be sufficient for the jury to return a guilty verdict based on the application paragraph, rather than the charge as a whole.

The issue in *Brown* was thus precisely framed: Is it a correct application of *Jackson, Burks* and *Greene* to measure the sufficiency of the evidence against the application paragraph of the jury charge?

In an opinion written by Justice Goldberg, the Fifth Circuit answered that question with a clear "NO". The Fifth Circuit firmly rejected Brown's argument, noting:

> ". . . In this case, the court instruced the jury on the law of parties thereby placing that theory of culpability before the jury. . . . Although the evidence did not conform *strictly* to the theory of culpability as . . . charged in the *application paragraphs* of the court's instructions, we hold that the evidence sufficed to prove the substantive elements of aggravated robbery under the law of parties as charged generally in the court's instructions." *Supra* at 182.

Indubitably, *Brown* is indistinguishable from this case.

The same decision reached in *Brown* is mandated here. As the Court noted in *Jackson v. Virginia, supra,* at 324

n. 16, the sufficient evidence standard "must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law". When read in conjunction with § 7.01(c), the Texas burglary statute makes a defendant liable if he or someone for whom he is criminally responsible commits the elements of burglary. Under the law of parties, there unquestionably was sufficient evidence that Respondent Walker, in cooperation with an accomplice, committed the K-Mart burglary. The law of parties was accurately stated to the jury and the State argued this theory of liability to the jury.

The Fifth Circuit's recent decision in *Brown* is not an isolated phenomenon. For years the federal appellate courts have rejected unanimously the notion that the sufficiency of the evidence should be judged by a jury charge which erroneously increased the prosecution's burden of proof or contained errors in the defendant's favor. See, e.g., *United States v. Clizer*, 464 F.2d 121 (9th Cir. 1972); *United States v. Good Shield*, 544 F.2d 950 (8th Cir. 1976); *United States v. Thomas*, 567 F.2d 638 (5th Cir. 1978); *United States v. Carlson*, 561 F.2d 105 (1st Cir. 1977); *United States v. Van Buren*, 513 F.2d 1327 (10th Cir. 1975); *Payne v. Janasz*, 711 F.2d 1305 (6th Cir. 1983). The break between federal sufficiency jurisprudence and the Court of Criminal Appeals' purported application of *Jackson*, *Burks*, and *Greene* has become ever more apparent in recent months. *See, e.g., United States v. Schwartz*, 899 F.2d 243 (3rd Cir. 1990); *United States v. Luster*, 896 F.2d 1122 (8th Cir. 1990); *United States v. Terzado-Madruga*, 897 F.2d 1099 (11th Cir. 1990); *Gladden v. Roach*, 864 F.2d 1196 (5th Cir. 1989); *United States v. Padilla*, 869 F.2d 372 (8th Cir. 1989).

The Court of Criminal Appeals' error in this case follows numerous other erroneous applications of the federal sufficiency doctrine in Texas courts. *See, e.g., Garrett, supra; Jones, supra; Benson v. State,* 661 S.W.2d 708 (Tex. Cr. App. 1982); *Ortega v. State,* 668 S.W.2d 701 (Tex. Cr. App. 1983) (opinion on rehearing); and *Boozer v. State,* 717 S.W.2d 608 (Tex. Cr. App. 1984). It is now quite clear that what the federal courts mean by "insufficient evidence" and what the Texas courts mean by the federal doctrine of "insufficient evidence" are two entirely different things. It is also obvious that the evidence in the present case was sufficient under the federal decisions of *Jackson, Burks* and *Greene.*

Just this term, this Court noted that where a jury was presented with two grounds for conviction, one supported by sufficient evidence, and one not, it was proper to assume that the jury rested its general verdict on the count supported by sufficient evidence. *Griffin v. United States,* ____U.S.____, 112 S. Ct. 466 (1991). Similarly, in the present case, the jury was certainly capable of correctly applying the law as it was presented to them at trial and in the charge as a whole, even though the application paragraph gave an incomplete instruction. By reversing the conviction and ordering an acquittal, the Court of Criminal Appeals failed to properly respect the jury's ability to render a competent decision on the basis of the law and the facts that were properly presented to them.

The Court of Criminal Appeals' misguided reliance on federal doctrine to justify its own unique sufficiency doctrine wreaks havoc on the State. This misapplication of *Jackson, Burks,* and *Greene* requires a standard of perfection in prosecution which can rarely be met by the

State. Such a result is clearly not contemplated by federal law. It is apparent that no relief is forthcoming from the Court of Criminal Appeals.[3] The only way that the State may obtain relief is if this Court grants the petition for certiorari and subsequently clarifies the federal sufficiency doctrine so that the Court of Criminal Appeals will follow federal law or use independent State grounds to justify its position. Review is especially critical considering the drastic remedy of acquittal that the Court of Criminal Appeals has ordered, a remedy required solely by its erroneous application of federal law.

CONCLUSION

For the reasons stated herein, a writ of certiorari should be granted in this case. The judgment of the Court of Criminal Appeals should be reversed and the case should be remanded to that court for further proceedings.

Respectfully submitted,

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3. The Court of Criminal Appeals recently reversed a conviction and ordered an acquittal in *Biggins v. State*, _____S.W.2d_____ (Tex. Cr. App. No. 317-90; delivered January 8, 1992). The Court of Criminal Appeals noted, "The State has not presented any argument not previously considered by this Court. Therefore, we find the dispopsition of the instant case is controlled by *Jones* and *Walker*." *Supra* (slip opinion, p. 3).

APPENDIX A

NO. 12-87-00158-CR

IN THE
COURT OF APPEALS
TWELFTH COURT OF APPEALS DISTRICT
TYLER, TEXAS

DANIEL WAYNE WALKER, APPELLANT

v.

THE STATE OF TEXAS, APPELLEE

APPEAL FROM THE 241ST
JUDICIAL DISTRICT COURT OF
SMITH COUNTY, TEXAS

Daniel Wayne Walker was convicted by a jury of burglary of a buiding.[1] The trial judge assessed his punishment[2] at 40 years. The record reveals that on September 4, 1986, a K-Mart store located on Northwest Loop 323 in Tyler was burglarized. Entry was gained by breaking the glass doors located on the west side of the building. Two television sets and a number of firearms were removed by the burglars. The gun case from which the firearms were taken had glass doors which were broken out. We will reverse and order an acquittal.

Although Walker was represented at trial by appointed counsel, he brings this appeal pro se. Walker asserts

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1. Under Tex. Penal Code Ann. § 30.02(a)(1) (Vernon 1974), hereinafter referred to as section 30.02.

2. Punishment was enhanced by two prior convictions.

six points of error. By his first point he contends that the evidence is insufficient to sustain his conviction. He claims under his second point of error that the indictment in the cause is fundamentally defective. Under his third point of error he asserts that the visiting judge who heard his case had no authtority to do so. He contends by his fourth point of error that the court erred in instructing the jury on the law of parties. By his fifth point, he alleges that the court erred in "admitting testimonie [sic] of extraneous offense during trial." Finally, by his sixth point of error, he argues that the "trial court" erred in "sending false documents to [this court] under false pretense."

The circumstantial evidence is fairly summarized as follows. Two of Walker's right-hand palm prints were found on the side and on the screen of one of the television sets taken in the burglary. The television was found by an officer outside the building. The evidence shows that at a time after the police had been informed that the palm prints had been so identified, an arrest warrant was issued for Walker. Police Officer Richard Sanders apprehended Walker who, when asked by Sanders if he was Daniel Wayne Walker, replied that his name was Fred Walker, Daniel Wayne Walker's brother. Sanders then asked Walker if he would voluntarily accompany him to the Tyler Police Station and submit his fingerprints for comparison to known prints of Daniel Wayne Walker. Walker agreed, but before they left the area where Walker was apprehended by the officer, a black passenger in a passing vehicle "leaned out of the window and hollered 'Hi Danny.'" Officer Sanders then arrested Walker and took him to the police station where he was advised that he was under arrest for the

burglary of a building. The officer testified that he did not identify the particular building that had been burglarized. Thereafter, Sanders transported Walker to the Smith County Jail to book him in as a prisoner. While the paper work was being processed, an unidentified black man sat down beside Walker at the jail and asked Walker why he was there. Walker initially responded that he was charged with burglary, whereupon the black male asked Walker, "What burglary?" To this question Walker answered, "They got me in here on the burglary of K-Mart up north but I didn't do it."

The record also reveals that the investigating officers lifted three sets of fingerprints from surfaces at the burglary scene. A comparison of these latent prints was made to known prints of Walker and three other suspects in the case. According to the testimony of the State's fingerprint expert, the latent prints did not match the known prints of Walker or the other suspects. Additionally, the evidence shows that some unidentified person or persons suffered severe cuts while breaking the glass doors of the gun case from which the firearms were taken.

We have carefully examined the indictment[3] in this cause and find that it correctly charges the offense of burglary of a building as that offense is defined by section 30.02. Walker's second point of error is overruled.

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3. Omitting the formal parts, the indictment reads:
[T]hat on or about the 4th day of September, 1986, and anterior to the presentment of this Indictment, in the County and State aforesaid, DANIEL WAYNE WALKER did then and there, intentionally and knowingly, without the effective consent of WILLIAM PARKS, the owner thereof, enter a building not then and there open to the public, with intent to commit theft; . . . .

Walker's trial was presided over by the Honorable Richard Davis who, at the time of trial, as we judicially notice, was the duly elected and sitting judge of the 294th District Court of Van Zandt and Wood Counties. The record does not contain an assignment of Judge Davis to this case or to the 241st Judicial District Court of Smith County pursuant to Tex. Gov't Code Ann. § 74.056(a) (Vernon Supp. 1988); nor does the record contain any evidence that he exchanged benches with the elected judge of the 241st District Court pursuant to Tex. Const. art. I, § 11. Walker, however, did not object to, or challenge, the right or authority of Judge Davis to sit in his case. He therefore waived his right to complain thereof in this court. Under the circumstances, a presumption obtains that Judge Davis was either assigned to the 241st District Court pursuant to Texas Government Code provisions or had exchanged benches pursuant to the Texas Constitution. *Floyd v. State*, 488 S.W.2d 830, 832 (Tex. Cr. App. 1972), and *Woods v. State*, 569 S.W.2d 901, 903 (Tex. Cr. App. 1978). The third point of error is overruled.

Walker complains under his fourth point of error that the court reversibly erred by including in the court's charge at the guilt-innocense phase an abstract charge on the law of parties. The charge complained of, and objected to at trial, reads:

> All persons are parties to an offense who are guilty of acting together in the commission of an offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

> A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. Mere presence alone will not constitute one a party to an offense.

The State argues in response that since the law of parties was not applied to the facts of the case, and since the evidence did not require the charge on the law of parties, no error exists. If error does, however, exist, the State alternatively argues that such error is harmless under *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Cr. App. 1984). This argument necessarily assumes *that the abstract charge* is not effective to authorize a jury to convict Walker if they found that Walker was criminally responsible for the burglary committed by other persons under Tex. Penal Code Ann. § 7.01(a) and § 7.02(a)(2) (Vernon 1974), which are embodied in the abstract charge.

We are persuaded that the circumstantial evidence raises the fact issue of whether Walker was guilty as a party to the offense under sections 7.01(a) and 7.02 (a)(2) of the Texas Penal Code. Hence the court did not err in overruling Walker's objection to the charge on "the law of parties." [4] The fourth point of error is overruled.

With respect to Walker's fifth point of error, we have carefully reviewed the record and find no testimony or evidence introducing any extraneous offense, or any objection relating thereto. The point of error is overruled.

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4. Although the charge was incomplete, Walker did not object to the court's failure to apply the law of parties to the facts presented.

Walker's sixth point of error does not relate to any proceeding before the trial court or jury during the criminal trial itself. It is patently unmeritorious and is overruled.

We now address Walker's first point of error, whereby he claims that the evidence is insufficient to sustain his conviction. In so doing, we must "measure" or evaluate the evidence in light of the court's entire charge. *Boozer v. State*, 717 S.W.2d 608, 610-611 (Tex. Cr. App. 1984); *Benson v. State*, 661 S.W.2d 708, 714 (Tex. Cr. App. 1982 and 1983). It is clearly established that the trial court must "fully instruct the jury on the law applicable to the case and to apply[5] that law to the facts presented. Article 36.14 Vernon's Ann. C. C. P.; *Rider v. State*, 567 S.W.2d 192 (Tex. Cr. App. 1978)." (Citations omitted.) *See Jackson v. State*, 633 S.W.2d 897, 899 (Tex. Cr. App. 1982).

In *Romo v. State*, 568 S.W.2d 298, 302-304 (Tex. Cr. App. 1978), the defendant was indicted for murder. The indictment charged that he "did . . . intentionally and knowingly cause the death of an individual . . ., by shooting him with a gun . . . ." The "application" paragraph of the court's charge tracked the indictment, authorizing

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5. The paragraph of the charge applying the law to the facts reads:

5.

Now if you find from the evidence beyond a reasonable doubt that on or about the 4th day of September, 1986 in Smith County, Texas, the defendant, DANIEL WAYNE WALKER, did then and there, intentionally or knowingly, without the effective consent of WILLIM PARKS, the owner thereof, enter a building not then and there open to the public, with intent to commit theft, then you will find the defendant guilty as charged.

Unless you so find from the evidence beyond a reasonable doubt, or if you have a reasonable doubt thereof, you will find the defendant not guilty.

the jury to convict Romo only as the primary actor. In a subsequent paragraph, the court abstractly instructed the jury on the law of parties pursuant to Tex. Penal Code Ann. § 7.01(a),(b) and § 7.02(a)(2). Judge Odom, who wrote the opinion on Romo's motion for rehearing, noted that "[n]o evidence supported submission of the case on the theory that [Romo] was the primary actor." *Id.* at 299. Judge Odom declared for the court that the trial court's failure to apply the law of parties to the facts constituted "fundamental reversible error in the . . . charge . . . ." *Id.* at 300. The State's motion for rehearing, however, was then granted with a plurality opinion by Judge Dally. After deciding that, absent an objection on the part of appellant, the failure of the trial court to apply the law of parties to the facts is not reversible error, the *Romo* court proceeded to consider and overrule Romo's point of error "that the evidence is insufficient to show [Romo's] criminal responsibility for the acts of the co-defendant who shot the deceased." *Id.* at 303. Since *Romo is* a pre-*Benson* case, its ruling on the insufficiency point did not take *Benson's* rule into account. To the contrary, the *Romo* court recited the facts and circumstances proved by the State by direct evidence, and, according to the opinion, those facts and circumstances were ample to support Romo's conviction as a party.

For purposes of our opinion, we must assume that *Benson* and *Boozer* do not permit this Court to measure the sufficiency of the evidence in the case before us on a standard contrary to the ones enunciated therein.

In *Garrett v. State*,[6] 642 S.W.2d 779, 781 (Tex. Cr. App. 1982) (*Garrett I*), the court followed *Romo* and concluded that circumstances in which the trial court

6. Like *Romo, a pre-Almanza* and pre-*Benson* case.

abstractly charged the jury on the law of transferred intent,[7] but did not apply the provisions thereof to the facts of the case, did not, in the absence of an objection by Garrett, "[constitute] a fundamental defect requiring reversal." *Id.* at 781. As a result of that holding, the court reversed the judgment of the San Antonio Court of Appeals and remanded the case to that court. On remand, the San Antonio Court, in consideration of Garrett's point of error challenging the sufficiency of the evidence—raised for the first time by an amended brief following remand, reversed the judgment of the trial court and ordered an acquittal. *Garrett v. State,* 656 S.W.2d 97, 101 (Tex. App.—San Antonio 1983), *judgmt of acquittal aff'd, Garrett v. State,* 749 S.W.2d 784, 795 (Tex. Cr. App. 1986) (*Garrett II*). The San Antonio Court, relying on *Benson* and *Garrett I,* concluded that since the sufficiency of the evidence must be assessed without consideration of the provisions of section 6.04, there was no evidence that Garrett was aware of the nature of her conduct, that the circumstances existed, or that her conduct in firing a rifle would with reasonable certainty cause the death of the deceased. *See* Tex. Penal Code Ann. §§ 19.01(a)(1) and 6.03(b) (Vernon 1974). Otherwise stated, the court of appeals, looking to *Benson* and *Garrett I,* determined that the abstract charge on transferred intent was ineffective to authorize the jury to convict Garrett on that theory.

The original opinion in *Garrett II,* written by Judge Clinton, interprets *Benson* to hold that the sufficiency of the evidence must be tested solely in light of the paragraph of the trial court's charge applying the applicable law

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7. Pursuant to Tex. Penal Code Ann. § 6.04 (Vernon 1974), hereinafter referred to as section 6.04.

to the facts proved by the State. *Benson's* rule, according to Judge Clinton, exists because that paragraph fixes the authority of the jury to convict, and instructs the jury as to which specific facts they must find to be true, beyond a reasonable doubt, before they can convict the accused of the involved offense. *Garrett II*, 749 S.W.2d at 788. However, in Judge Campbell's opinion on the State's motion for rehearing in *Garrett II*, there is language which contradicts Judge Clinton's interpretation of *Benson*. On the State's motion for rehearing, the court wrote:

> A different concern raised by [this case], although it is not mentioned in the State's motion for rehearing, is its possible effect on *subsequent cases*. A close inspection of [the original opinion in this case] reveals that it is a product of an unusual set of circumstances, illustrating the tension between pre- and post-*Almanza* analysis, which have created a result that appears to be something it is not. *At first blush, this case seems to require that a measurement of the sufficiency of the evidence be limited to a sole consideration of the application paragraph of the jury charge. This would be misapplication of the rule enunciated in Boozer v. State*, 717 S.W.2d 608 (Tex. Cr. App. 1986); *Ortega v. State*, 668 S.W.2d 701 (Tex. Cr. App. 1983); *and Benson v. State*, 661 S.W.2d 708 (Tex. Cr. App. 1983). *Boozer, Ortega, and Benson hold that sufficiency of the evidence be measured against the jury charge, which we interpret to mean entire charge.*

Garrett II, 749 S.W.2d at 802-803 (emphasis ours, footnote omitted). In footnote 2 of 749 S.W.2d at 803, the *Garrett II* court states that it was bound by "the law of

the case"[8] declared in *Garrett I*, and was thereby constrained to so hold, and that "the question of *what theory* the State must use to prove [Garrett's] guilt may not be relitigated." *Garrett II*, footnote 2 (emphasis ours). It is noteworthy that the author of the original opinion joined Judge Campbell's opinion in *Garrett II*. The last word of *Garrett II* is that *Benson-Boozer* requires the sufficiency of the evidence to be measured in light of the entire charge, not just the paragraph applying the law of the case to its particular facts. Thus, in testing the sufficiency of the evidence in the case before us, we follow *Garrett II* and look to the entire charge in determining Walker's first point of error.

Unlike *Garrett II*, in which the abstract charge on the law of transferred intent related solely to the conduct of the defendant and her mental state at the time of the killing, our case involves an abstract charge on the law of parties under which Walker will be subjected to criminal responsibility for the conduct of other unidentified parties if the abstract charge is sufficient to authorize the jury to convict him on that theory. Before Walker can be convicted as a party to the offense, the jury must first find from the evidence beyond a reasonable doubt that another person or other persons committed the offense. Neither the abstract charge nor any other instruction contained in the court's charge expressly so instructs the jury. Hence, the charge does not authorize the jury to convict Walker as a party to the offense. Therefore, applying *Benson, Boozer* and *Garrett II*, we must determine whether the circumstantial evidence is sufficient to support Walker's

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8. Relating to the implied holding of *Garrett I* that the sufficiency of the evidence must be measured solely in conformity with the charging paragraph which applies the law to the facts.

conviction on the theory that he, as a primary actor, committed the burglary.

Under applicable case law, identification of a defendant by fingerprint testimony is not conclusive. *E.g. Caudillo v. State,* 167 Tex. Cr. R. 147, 318 S.W.2d 891, 892 (1958). If under the circumstances of the particular case a reasonbale hypothesis exists which is inconsistent with the defendant's guilt, then the evidence is insufficient to support a guilty verdict. Otherwise stated, "if the evidence [viewed in the light most favorable to the verdict] supports an inference other than the guilt[9] of the [accused], a finding of guilt beyond a reasonable doubt is ~~not~~ a rational finding." *Carlsen v. State,* 654 S.W.2d 444, 449 (Tex. Cr. App. 1983).

The circumstances before us are quite different from those presented in *Grice v. State,* 142 Tex. Cr. R. 4, 151 S.W.2d 211 (1941). In *Grice,* a thumb print was lifted from a glass pane removed by the burglar from a door through which the burglarious entry was made. A portion of that print was impressed on a part of the glass which had been previously covered by a molding removed by the burglar at the time of the offense. The *Grice* court concluded that the incriminating fingerprint "was, of necessity, made . . . at the time of the entry." *Id.* at 213. That court further concluded:

> that where the evidence, as here, shows the finger print[10] found at the scene of the crime was left there by the criminal at the time the crime was committed, thereby excluding the hypothesis that it might have been placed there innocently prior to or subsequent to the commission of the crime . . . that such evidence

9. "Guilt" in this case, means guilt as a primary actor.
10. Identified as that of the accused.

> satisfies the law and excludes every reasonable hypothesis save guilt of the accused.

Grice, 151 S.W.2d at 222.

In the instant case, Walker's palm prints were lifted from the television set found *outside* the K-Mart building next to a fence which surrounded the garden area grounds. A reasonable inference assuredly arises from that evidence that Walker, although he never entered the building, carried the property from just outside the doorway of K-Mart to the location where it was first found by the officers.

The other evidence relied on by the State to convict Walker consisted of the following: He lied to Officer Sanders; following his arrest he told the unidentified black male that he was charged with the K-Mart burglary, demonstrating that he had guilty knowledge of the burglary; and that some of the stolen property was found at a location between the K-Mart store and Walker's home. Testimony was given that fingerprints, broken glass, and quantities of blood were found at the crime scene, all of which were probative of the fact that one or more unidentified persons participated in the burglary. Aside from the palm-print evidence, however, no other facts were introduced which tended to place Walker at the scene of the burglary at or near the time of its commission. Walker did not testify, and no other evidence was presented which tends to show that Walker's palm prints could have been impressed on the television set before or after the commission of the offense.

Walker's conduct in lying to Sanders and his personal "guilty" knowledge of the K-Mart burglary certainly supports his complicity in the offense, whether as a party or as a primary actor. If the charge had authorized the

jury to convict him as a party *or* as a primary actor, we would have no difficulty in concluding that rational jurors could have found each essential element of the offense beyond a reasonable doubt. Based on the circumstances presented, however, and the jury's limited authority under the court's charge, we are persuaded, viewing the evidence in the light most favorable to the verdict, that a reasonable inference arises from that evidence that other persons committed the burglary and that Walker aided and assisted them,[11] and thus Walker, if guilty, was guilty only as a party.

At trial, the State made no request that the law of parties be applied to the facts of the case; neither did the State object to the court's failure to do so. Hence, the unobjected to error of the trial court in failing to apply the law of parties to the facts cannot be said to transform the insufficiency of the evidence to mere "trial error" that may require reversal, but not acquittal, under jeopardy's rule. *Boozer*, 717 S.W.2d at 611, 612; *Ortega v. State*, 668 S.W.2d 701, 704-705 n. 10 (Tex. Cr. App. 1983) (opinion on original submission).

The judgment is accordingly reversed, and an acquittal is ordered. *Burks v. United States*, 437 U.S. 1, 98 S. Ct. 2141, 57 L.Ed.2d 1 (1978), and *Greene v. Massey*, 437 U.S. 19, 98 S. Ct. 2151, 57 L.Ed.2d 15 (1978).

/s/ PAUL S. COLLEY
Paul S. Colley
Justice

Opinion delivered May 12, 1989.
(PUBLISH)

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11. Indeed, the State so argued to the jury at the guilt-innocence phase.

APPENDIX B

Petition for Discretionary Review from
the Twelfth Court of Appeals

[SMITH County]

No. 896-89

DANIEL WAYNE WALKER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

Appellant was convicted by a jury of the offense of burglary of a building. The trial court assessed punishment at forty years confinement. The Court of Appeals reversed the conviction and ordered an acquittal. *Walker v. State,* ____S.W.2d____ (Tex. App.—Tyler, No. 12-87-158-CR, delivered May 12, 1989). We granted review to determine whether the evidence was sufficient to sustain the conviction in light of the jury charge. We will affirm the judgment of the Court of Appeals.

The indictment in this case alleged appellant committed this offense as a primary actor. The court's charge included an abstract instruction on the law of parties. The application paragraph tracked the language of the indictment but failed to include any reference to the immediately preceding general parties instructions.

The Court of Appeals found that the charge allowed the jury to convict only if they found appellant guilty by his own conduct. The Court of Appeals reviewed the evidence to determine whether any rational trier of fact could have found appellant guilty beyond a reasonable doubt as a result of appellant's own conduct. Finding there was no evidence that appellant entered the building the Court of Appeals reversed and ordered acquittal.

In *Jones v. State*, ____S.W.2d____ (Tex. Cr. App. No. 937-89, delivered June 26, 1991) (reh'g denied this day), we held that in order for the jury to be authorized to convict one as a party, the law of parties must be included in the application paragraph of the charge. *Jones*, ____ S.W.2d at ——, slip op. at 6. Since the law of parties was not included in the application paragraph in this cause, we must determine whether the evidence is sufficient to find appellant guilty by his own conduct.

The State's case was based entirely on circumstantial evidence. Police responded to a burglar alarm at a K-Mart store shortly after 1:30 a.m. There were no eyewitnesses and the burglars fled before police could arrive. The store had been entered by shattering a glass door connecting the fenced-in garden center area to the enclosed part of the buliding. Two televisions were recovered from this garden area. Police found two sets of footprints coming from the store which led them to four shotguns in a grassy area adjacent to the store.

The weapons had been taken by breaking a glass case. One of the burglars cut himself on the glass and bled considerably in and outside the store. Blood was found on the shotguns, on and near the glass case, and outside the store. No blood was found on the televisions. This

combined with the two sets of footprints, led police to believe that at least two people were involved. Samples of the blood were taken. The televisions were dusted for fingerprints. No usable fingerprints were found on the shotguns or inside the store. No blood test comparison was sought for appellant since the officers believed it was the other burgular who cut himself. An anonymous tip led police to suspect appellant. Some of the prints found were made by appellant's right palm consistent with carrying the television, as opposed to merely handling it as it sat on a sixty-six inch high shelf. Other prints found on the television were not identified.

Appellant was arrested seven weeks later. At the time of his apprehension appellant gave the officer a false name. Officers informed appellant only that the charge was burglary and gave him no details. While appellant was in the booking area of the jail, he spoke with an unidentified individual he knew. One officer overheard appellant say, "They got me in here for burglary of K-Mart up north but I didn't do it."

Viewing the evidence in the light most favorable to the verdict, we find the State proved at most that appellant picked up one of the televisions. None of the State's evidence showed appellant actually entered the building himself, although it can certainly be inferred from the evidence that he did so. When approached by police, appellant lied about his identity and exhibited some guilty knowledge about the offense while at the jail. This allows the inference that appellant knew about the burglary and was somehow involved.

One reasonable possibility is that appellant entered the building and carried the television to the garden area.

Another reasonable hypothesis is that appellant waited outside the building and carried the television handed to him by the one who entered the store. This is entirely consistent with the statement made by appellant at the jail, the palm print evidence and the location of the televisions.

The evidence must be reviewed to determine whether it supports the finding that appellant was guilty by virtue of his own conduct. Since this is a circumstantial evidence case, we must determine whether the evidence excludes every reasonable hypothesis other than the guilt of appellant by his own conduct. *Carlsen v. State,* 654 S.W.2d 444 (Tex. Cr. App. 1983). The evidence does not exclude the reasonable hypothesis that appellant was guilty only as a party. Therefore, the evidence is insufficient to support the conviction when viewed *in light of the charge given.* Accordingly, the judgment of the Court of Appeals is affirmed.[1]

PER CURIAM

Benavides, J., concurs in the result.
(Delivered September 18, 1991)
En Banc

Publish

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1. The Court of Appeals correctly recognized:
   At trial, the State made no request that the law of parties be applied to the facts of the case; neither did the State object to the court's failure to do so. Hence, unobjected to error of the trial court in failing to apply the law of parties to the facts cannot be said to transform the insufficiency of the evidence to mere "trial error" that may require reversal, but not acquital, under jeopardy's rule. (citations omitted).
   Slip op. at 12.

Petition for Discretionary Review from
the Twelfth Court of Appeals

[SMITH County]

NO. 896-89

DANIEL WAYNE WALKER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

CONCURRING OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

"In all criminal prosecutions the accused shall have a speedy public *trial by an impartial jury.*" Article I, § 10, Constitution of Texas. "No citizen of this State shall be deprived of life, liberty, property, privilege or immunities . . . except by the *due course of the law of the land.*" *Id.*, § 19.[1]

"[T]he jury is the exclusive judge of the facts, but it is bound to receive the laws from the court and be governed thereby." Article 36.13, V.A.C.C.P. Therefore, in every case tried to a jury, before the argument begins the trial judge shall "deliver to the jury . . . a written charge *distinctly* setting forth *the law applicable to the case*[.]" Article 36.14, V.A.C.C.P.

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1. "To guard against transgressions of the high powers of government herein delegated [by the people]," the framers declared that "everything in this 'Bill of Rights' is excepted out of the general powers of government, and *shall forever remain inviolate*, and all laws contrary thereto . . . shall be void." *Id.*, at 29. (All emphasis here and throughout this opinion is mine unless otherwise indicated.)

Such was the essential function of a jury charge at common law, and still is under the statutes. A fundamental principle of our jurisprudence is that only material factual issues tendered by pleadings, primarily the charging instrument, and raised by evidence are submitted to the jury.[2] In some cases, of course, material issues may

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2. Further, the judge is admonished that the charge of the court must not express any opinion as to the weight of the evidence, sum up the testimony, discuss the facts or use any argument "calculated to arouse the sympathy or excite the passions of the jury." *Ibid.*

As the language suggests, that a trial court is to charge the jury on the law applicable to the facts of the case is a requisite prescribed in like terms by Old Code articles 594-595. See generally Almanza v. State, 686 S.W.2d 157 (Tex. Cr. App. 1985) (Opinion on Rehearing, at 161). But there were several precursors.

First, in an effort to placate restless "Texians," the congress of the State of Coahila and Texas offered a "Plan for the Better Regulation of the Administration of Justice in Texas;" "Of the Trial Criminal Plenario" provided that after all testimony and argument by the parties. "The judge shall then make such obversations upon the evidence and facts deduced in the trial as he may think proper and necessary for the instruction of the jury, who shall then retire for deliberation." Decree No. 277, article 72, (1834), 1 Gammel's Laws of Texas 364, at 372 ("Gammel's").

The following year, however, Texians created a Provisional Government of Texas with a plan of governance that, *inter alia*, implicitly rejected the "Texas Plan" in favor of their own preference for common law, *viz*:

> "All trials shall be by jury, and in criminal cases the proceedings shall be regulated and conducted upon the principles of the common law of England[.]"

Plan and Powers of the Provisional Government of Texas, article VII (Nov. 13, 1835), 1 Gammel's 911. Similarly the Constitution of the Republic directed Congress to introduce by statute the common law of England, and mandated that "in all criminal cases, the common law shall be the rule of decision." Article IV, § 13, *Id.*, at 1074. Congress soon passed an Act to establish jurisdiction and powers of district courts, § 43 of which provided:

> "No judge of any of said courts shall charge the jury as to the weight of the evidence in any cause civil or criminal, but such judge may sum up the testimony, and *shall* charge the jury as to any matter of law arising thereon[.]"

Act of December 22, 1836, § 43, *Id.*, 1258, at 1269-1270.

(Footnote 2 Continued from 19a.)

Shortly after gaining statehood the Legislature passed an Act to Regulate Proceedings in District Courts, § 99 of which provided in pertinent part, *viz*:

> ". . . After the argument of a cause, and before the jury retires from the bar, the judge may deliver a charge to the jury, but under the following restrictions and regulations: the judge shall not in any case, civil or criminal, charge or [comment] on the weight of the evidence or testimony, and he shall so frame his charge as to submit questions of facts to the decision of the jury, and he *shall decide on and instruct them as to the law arising on the facts*, distinctly separating all questions of law from questions of fact; and no judge shall, in any case, make any further charge, unless on the application of the jury or a party."

Act of May 13, 1846, § 99, 2 Gammels' 1669, at 1696. Under that statement of requisites the Supreme Court of Texas would say:

> "It, undoubtedly, was . . . the duty of the Judge, to give in charge to the jury the law of the case, without regard to what had, or had not, been read to them by counsel, either for or against the prisoner. * * * * The Judge is the organ and expositor of the law, and is placed on the bench to explain it to the jury. It is not only his privilege, *in all cases*, but his duty, when called on, to state what the law is. In the language of the Court of Appeals of Kentucky, 'If the Judge had not the right to decide on the law, error, confusion, uncertainty and licentiousness would characterize the criminal trial; and the safety of the accused might be as much endangered, as the stability of public justice certainly would be,' &c. —3 J.J. Marshall, 149.
>
> The jury are the exclusive judges of the facts. The Judge may not charge them as to the weight of evidence. 1 Stat. 209, Sec. 43; Acts of 1846, 390. It is their peculiar and exclusive province to weigh the evidence; and it is their duty to find the facts *alone from the evidence;* and to look for them in no other quarter whatever. For the law, it is their duty to look to the court. In the present case, they were not authorized to give the slightest weight to any admission or statements of counsel as to the facts. The prisoner's counsel had no authority to make any admission or statement, to supply the place or have the force of evidence against him. No confession of theirs could bind or affect him. Their admissions could not, in law, prejudice or affect his rights; nor could they be in anywise jeopardized by the assumption of any grounds whatever, upon which his defence may have been placed by his counsel. Whether those grounds were correct or incorrect, true or false, was wholly immaterial. That was not the question for the consideration of the jury, whose duty it was to decide the question of guilt or innocence, *upon the law as*

(Footnote 2 Continued from 20a.)

> *given them by the court, and the evidence as given by the witnesses,* irrespective of any admissions by the prisoner's counsel, or any grounds upon which they may have rested his defence."

Nels v. The State, 2 Tex. 280, at 281-283 (1847) (original emphasis).

Still applying the 1846 statute, in similar vain the Supreme Court explained:

> "The error assigned in the charge of the court, is, in substance, that it does not distinguish and define the degrees of murder. But it must be observed that the mere omission to give instructions is not error. The court is not bound in any case to give instructions not asked for by the party. If the charge of the court was not satisfactory, it was the right of the defendant, or his counsel, to ask such instructions as he thought proper. . . . It is no objection to the charge of the court, that it supposes the state of fact which the evidence showed really to exist, and deduced the legal conclusion applicable to such state of facts. *That is precisely what every charge should do. That is the design and purpose of giving instructions to the jury; it is to inform them respecting the law applicable to the particular case in hand; and the more exactly the charge is adapted to the very case, the more likely will the jury be to arrive at a correct conclusion in the application of the law to the fact. Instruction beyond what the facts call for can never subserve any beneficial purpose; and may mislead. The charge should be framed and is to be considered in reference to the facts of the case.* And we are of opinion that there was nothing in the evidence in this case to call for an exposition of the law upon the degrees of murder."

O'Connell v. The State, 18 Tex. 343, at 363 (1857). Accord: Atkinson v. The State, 20 Tex. 522, at 529 (1857):

> "The court below, upon these facts, instructed the jury as to the law, by reading them the charge, *verbatim,* in the Jordan case (10 Tex. 492-4), and by giving them other charges, as asked by counsel, for the prisoner, on the subjects of manslaughter, self-defense, and reasonable doubts. The question is, whether or not this charge of the court, with reference to the facts of this case, was not calculated to mislead the jury. The great jurists of England and America have never been able to devise a charge which would be applicable to every case. Indeed, so vain is the task, it has never been essayed. A charge, which may properly direct the minds of the jury to the true point in one case, may mislead the jury in another, where a different turning point is indicated by the facts of it. It may be erroneous, too, by failing to present the distinctions between the different grades of the offense, where the facts, conflicting and leading

be raised by evidence that need not be alleged, yet should be properly conveyed to the jury for its determination.

Lately, though, there seems to be a tendency to include helter-skelter all sorts of abstract definitions and broad propositions as statutorily prescribed without first determining whether they are germane, in whole or in part, to the pleadings and conformable to the evidence, and then to fail to apply *distinctly* just the material matters of law to the facts of the case. Well illustrative are problems and proposed solutions spawned in the instant cause pertaining to the law of parties, as well as in decisions relied on in separate opinions and cases they cite and discuss involving other matters of law.

As permitted by V.T.C.A. Penal Code, § 7.01(c), the indictment charged appellant committed the offense of burglary of a building "without alleging the facts which make the defendant a party to the offense and criminally responsible for the conduct of another." And, "If the evidence supports a charge on the law of parties, as it does here, the court may charge on the law of parties even though there is no such allegation in the indictment." Pitts v. State, 569 S.W.2d 898, at 900 (Tex. Cr. App.

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to different conclusions, require such distinctions to be drawn. so as to enable the jury to determine to which grade the offense belongs. Mitchells' Case. 5 Yerg. 350. By neglecting this, the jury may as easily be misled, as in any ohter way."

Id., at 529.

The Old Code prescriptions for a charge to the jury were enacted against that background of prior statutes and previous decisions, and we are entitled to presume that the legislature was aware of those judicial constructions and had them in mind as it mandated trial judges to deliver "a written charge *distinctly* setting forth *the law applicable to the case.*" See Code Construction Act, 3 V.T.C.A., Government Code § 311.023.

1978); see Romo v. State, 568 S.W.2d 298 (Tex. Cr. App. 1977).[3]

The majority resolves the instant issue basically on the strength of Jones v. State —— S.W.2d —— (Tex. Cr. App. No. 937-89, delivered June 26, 1991), in that the law of parties was not included in the application paragraph of the charge. Judge Miller views the situation of the charge "factually different" from *Jones v. State,* supra, et al. Miller, J., dissenting, at 2.[4] Judge White dissents for the reasons stated in his dissenting opinion in *Jones;* Presiding Judge McCormick dissents to affirming an order of acquittal.

The majority in *Jones v. State,* supra, relies, *inter alia,* on the opinions in Garrett v. State, 749 S.W.2d 784 (Tex. Cr. App. 1983), in deciding the parties charge

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3. The prevailing opinion on State's motion for rehearing in *Romo v. State,* supra, is the product of four regular members of an equally divided Court and a Special Judge who concurred. *Inter alia,* the opinion holds "that in the absence of an objection, when the trial court fails to apply the law of parties to the facts of the case, it is not fundamental error." *Id.,* at 302. While my concern here is with emplementing requisites of law pertaining to a jury charge, not preservation of error and its consequences, I do observe that such nolding of *Romo* has been mooted by *Almanza v. State,* supra, *viz:* Unobjected error may still be fundamental in nature, but is reversible only when "egregious error."

4. As Judge Miller perceives it, the difference lies in the precise placement of abstract parties definitions in relation to the appplication paragraph. His premise is that there is an appellate presumption the jury considers all preceding abstract portions of the charge when it comes to address the application paragraph authorizing the jury to find guilt. *Ibid.* Therefore, he reasons, since the jury is "supposed to consider the charge as a whole unless misinstructed to do otherwise, . . . from a sufficiency standpoint, unless the state otherwise evidenced an intent that the application paragraph have a particular or narrowed meaning, we too should consider the charge as a whole in considering whether the jury's verdict was a rational one." *Ibid.,* n. 1; see also at 3.

issue. Slip Opinion, at 2-3. It concludes as a matter of law that "a charge which fails to apply a theory of law to the facts of the case is insufficient to authorize conviction on that theory even when the theory of law is abstractly defined in the charge." *Id.*, at 6. Accordingly, the majority finds the evidence insufficient to support a verdict finding appellant guilty as the principal actor (i.e., as a party to the offense committed by his own conduct, V.T.C.A. Penal Code, § 7.01(a)) *Id.*, at 6-7. Judge Miller concurs, believing the factual situation indistinguishable from *Garrett v. State*, supra.[5]

Presiding Judge McCormick dissents primarily because he believes recent opinions, e.g., *Garrett v. State*, supra, and Nickerson v. State, 782 S.W.2d 887 (Tex. Cr. App. 1990), have "reviewed only the application section of the charge to determine whether the evidence in each case is sufficient," Dissenting Opinion, at 7, while opinions in other cases have "looked to other parts of the charge," thus producing "necessarily perplexing" results, *id.*, at 8. His solution is to abandon the proposition that courts must determine sufficiency of evidence to support a verdict of guilt from the jury charge, in favor of a notion that measures sufficiency "against the State's theory of the case," *id.*, at 12, by "presupposing a hypothetically correct jury charge," *id.*, at 15.

For his part, Judge White is eqqually insistent that matters *dehors* the charge be taken into account in testing sufficiency "against the entire charge." White, J., dissenting, at 2-4, 5.

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5. In light of his dissenting opinion in the instant cause, Judge Miller must deem significant the fact that in *Jones* the abstract parties definition came *after* the application paragraph, as did the instruction on transferred intent in *Garrett*.

The concurring and dissenting opinions in these two causes, *Walker* and *Jones*, as well as in *Garrett*, reach beyond the issue of an instruction on parties to reveal widely divergent fundamental concepts underlying the purpose and function of a trial court charging a jury on the law applicable to the facts of a given case. That they surface at this late date—more than one hundred and fifty years since basic rules were authoritatively formulated in this jurisdiction to govern the practice, see note 2, *ante*—suggests a desire, if not determination, to introduce into our criminal law jurisprudence new notions of regulating jury charges and appellate review of that aspect of trial by jury.

Yet, if we but follow the doctrine of *stare decisis*, resolution of the immediate problems is not difficult. It is now axiomatic that in a proper case such as this one, the abstract law of parties should be specifically applied to the facts of the case. Johnson v. State, 739 S.W.2d 299, at 304-305 (Tex. Cr. App. 1987); Jaycon v. State, 651 S.W.2d 803, at 806-808 (Tex. Cr. App. 1983); Rasmussen v. State, 608 S.W.2d 205, at 207-208 (Tex. Cr. App. 1980) (Opinion on Original Submission); Apodaca v. State, 589 S.W.2d 696, at 698 (Tex. Cr. App. 1979); Savant v. State, 544 S.W.2d 408 (Tex. Cr. App. 1976); Harris v. State, 522 S.W.2d 199, at 202 (Tex. Cr. App. 1975); McCuin v. State, 505 S.W.2d 827, at 830 (Tex. Cr. App. 1974); Oliver v. State, 160 Tex. Cr. R. 222, 268 S.W.2d 467, at 470 (1954); Barnes v. State, 145 Tex. Cr. R. 131, 166 S.W.2d 708, at 710 (1942); Crisp v. State, 125 Tex. Cr. R. 603, 69 S.W.2d 772 (1934); Gentry v. State, 24 Tex. App. 478, 6 S.W. 321 (1887), and cases cited therein; Howell v. State, 661 S.W.2d 293, at 294 (Tex. App.—Houston [1st]) no

PDR history; see also 2 Branch's Annotated Penal Code (2nd Ed. 1956) 3-5, Art. 66, and Branch's Annotated Penal Code (1916) 346, § 678; for suggested instructions, see e.g., McClung, Jury Charges for Texas Criminal Practice (Rev. Ed. 1990) 15; McCormick & Blackwell, Texas Criminal Forms § 64.01, 8 Texas Practice 304-303; State Bar of Texas, Texas Criminal Pattern Jury Charges, CPJC 7.02(a)(2) (1975); 1 Branch's Texas Annotated Penal Code (3d Ed. 1974) 257, § 7.02(a)(2); Gates v. State, 67 Tex. Cr. R. 488, 149 S.W. 1194, at 1197 (1912); Hunter v. State, 59 Tex. Cr. R. 439, 129 S.W. 125, at 134-135 (1910). See Brown v. State, 716 S.W.2d 939 (Tex. Cr. App. 1986) (Campbell, J., concurring and dissenting, at 950).

Because a charging instrument need not, and thus ordinarily will not, allege *any* theory of criminal responsibility under V.T.C.A. Penal Code, §§ 7.01 and 7.02, the trial court is obliged to submit instructions that conform to the discrete theory raised by the evidence.[6] Merely to reproduce abstract portions of §§ 7.01 and 7.02 amounts to no application of the law to the facts whatsoever. "The failure of the court to apply the law to the

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6. The indictment in this cause allege simply that appellant "did then and there, intentionally and knowingly, without the effective consent of [named] owner thereof, enter a building not then and there open to the public, with intent to commit theft[.]"

Among the first four numbered paragraphs, some with subparagraphs, of abstract matters consuming three legal size pages, the last two subparagraphs deal abstractly with the law of parties, *viz*:

"All persons are parties to an offense who are guilty of acting together in the commission of the offense. A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he solicits, encourages,

specific facts [is] equivalent to giving no guidance to the jury on the basic theory of appellant's liability." *Romo*, supra (Onion, P.J., dissenting, at 306.

Moreover, when the evidence raises that defendant is criminally responsible for conduct of another, taking "shortcuts" in the application paragraph by positing that defendant committed the offense "either acting alone or with [named party or 'another'] as a party to the offense as that term is hereinbefore defined" will mislead the jury if there is no evidence that the offense was committed alone by his conduct; nor will it sufficiently inform the jury which specific manner(s) of conduct enumerated in § 7.02(a)(2), i.e., "solicits, encourages, directs, aids, or attempts to aid" or some combination thereof, may permit it to find alternative criminal responsibility. *Johnson v. State*, supra, at 305, n. 3; *State Bar of Texas*, supra, § 7.02(a)(2);[7] *McClung*, supra, at 16, PC Sec. 7.01, para 4.[8]

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directs aids, or attempts to aid the other person to commit the offense. Mere presence alone will not constitute one party to an offense."

Tr. 45, at 47.

The fifth paragraph purports to apply the law to the facts, solely in terms of the indictment, adding a short converse instruction. *Id.*, at 48.

7. In pertinent part, that pattern charge recommends part, *viz*:

"* * * *

A person is criminally responsible for an offense committed by the conduct of another if, acting with intent to promote or assist the commission of the offense, he *solicits* 2 the other person to commit the offense.

Therefore, if you believe from the evidence beyond a reasonable doubt that the defendant either by his own conduct _____, or, acting with intent to promote or assist the commission of offense, *solicited* 5 _____ to commit the offense charged, as defined above, and that the said _____ did _____ . . . ."

---

* * * *

2 Or *encourages* or *directs* or *aids* or *attempts to aid*.

* * * *

Reminiscent of pronouncements made by the Supreme Court of Texas when it was exercising appellate jurisdiction in criminal law matters, see note 2, *ante,* are verities stated by Judge Odom and followed by the Court during the Seventies, *viz*:

> "The law must come from the court, the facts must be decided by the jury, and the charge, to instruct the jury properly, must apply the law to the facts raised by the evidence. * * * *
>
> * * * * There should be but one controlling application of the law to the facts, and that application should come from the court. Its absence impairs the right to trial by jury and, therefore, by definition, is 'calculated to injure the rights of the defendant,' (Art. 36.19, supra) to a trial by jury.
>
> It is not the function of the charge merely to avoid misleading or confusing the jury: it is the function of the charge to lead and to prevent confusion.
>
> A charge that does not apply the law to the facts fails to lead the jury to the threshold of its duty: to decide those fact issues. A charge that leaves application of the law to the facts solely in the hands of

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5. Or *encouraged or directed* or *aided* or *attempted to aid.* (emphasis in original.)

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8. Having set forth an abstract statement of law of parties, McClung similarly suggests an application paragraph based selectively on the evidence, *viz*:

> "Now if you find from the evidence beyond a reasonable doubt that . . . CD did intentionally or knowingly cause the death of an individual, XY . . . and that the defendant, AB, acted with intent to promote or assist the commission of the offense by CD by (encouraging) (directing) (aiding) (attempting to aid) CD to commit the offense of causing the death of XY, you will . . . ."

> the partisan advocates does not guard against the confusion that such partisan claims inspire. Because a charge should affirmatively lead and dispel confusion, and because a charge that does not apply the law to the facts fails to give such guidance, error of this character should remain the subject of a per se rule."

Williams v. State, 547 S.W.2d 18, at 20 (Tex. Cr. App. 1977); Accord: Williams v. State, 622 S.W.2d 578, at 579 (Tex. Cr. App. 1981).

Since sufficiency of evidence is tested by the charge of the court as given, Boozer v. State, 717 S.W.2d 608, at 610-611 (Tex. Cr. App. 1984), failure or refusal of the court properly to apply the law of parties to facts of the case risks an ultimate acquittal of defendant, just as ordered in this cause and in *Jones*.[9]

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9. Whether pleadings tender an issue as an element of the offense, or the law contemplates it as a matter germane to guilt, e.g., complicity, causation, *et cetera*, the governing principle is the same: Any factual issue submitted to the jury must be raised by, and should be framed in accordance with and limited to, the evidence in the case. See McCormick & Blackwell, Texas Criminal Forms and Trial Manual § 80.01, 8 Texas Practice 229 ff.

"Conduct does not constitute an offense unless it is *defined* as an offense by statute [or other valid law]." V.T.C.A. Penal Code, 1.03(a). " 'Conduct' means an act or omission and its *accompanying* mental state." *Id.*, 1.07(a)(8). A penal statute usually defines an offense in terms of "the forbidden conduct," "the required culpability," and "any required result" that constitute elements of a particular offense. *Id.*, 1.07(a)(13). Thus beginning with Title 4 of the Penal Code the format throughout is to introduce the definition of an offense with this pointed opening: "A person commits an offense if . . . ," followed by a statement that identifies essential elements of that offense. Of course, sometimes the statute may provide more than one manner and means of committing the same offense.

Accordingly, the Court has admonished that in informing the jury of the law defining the offense at issue the trial judge must take care to set out only that portion of the definition of the offense alleged in the charging instrument and raised by evidence. Dowden v. State, 537 S.W.2d 5, at 7 (Tex. Cr. App. 1976); see Boston v. State, 642 S.W.2d 799, at 803, n.6. (Tex. Cr. App. 1982).

For these reasons I concur in the judgment of the Court.

CLINTON, Judge

DELIVERED: September 18, 1991

EN BANC

PUBLISH

Maloney, J., joins.

"Except as provided in Subsection (b) of this section, a person does *not* commit an offense *unless* he intentionally, knowingly, recklessly, or with criminal negligence engages in conduct *as the definition of the offense requires*" V.T.C.A. Penal Code, § 6.02(a). Thus the "unless" clause recognizes that "conduct" comprises distinct types of elements that must be distinguished to avoid confusing the proof requirements of respective culpable mental states, *viz*: "nature or conduct." "circumstances surrounding conduct." and result of conduct." See Lugo-Luga v. State, 650 S.W.2d 72 (Tex. Cr. App. (1983) (also Clinton, J., dissenting, at 86-87). The correct aspect of culpable mental state to be identified and applied to the facts depends on the type of element of conduct called for in the statutory definition of the offense alleged. *Id.*, at 87-88; Alvardo v. State, 764 S.W.2d 36, at 38 (Tex. Cr. App. 1985). For example, the appropriate culpable mental state for assaultive offenses such as causing injury to a child or elderly or invalid individual is the" result of conduct" element, Kelly v. State, 748 S.W.2d 236, at 238-239 (Tex. Cr. App 1988); *Alvardo v. State,* supra, at 38.

The lessons here have not changed in substance since the Supreme Court of Texas taught them in criminal cases from the beginning until 1876. See again n.2, *ante;* cf. e.g., Edwards v. State, 96 Tex. Cr. R. 574, 259 S.W. 578 (1924); Smith v. State, 67 Tex. Cr. R. 27, 148 S.W. 699, at 700-701 (1912).

Petition for Discretionary Review from
the Twelfth Court of Appeals
[SMITH COUNTY]

No. 896-89

DANIEL WAYNE WALKER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

DISSENTING OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

I dissent to the majority's holding that the sufficiency of the evidence in the case at bar will be judged solely by the contents of the application paragraph of the court's charge and not by the contents of the charge as a whole. *Boozer v. State,* 717 S.W.2d 608 (Tex. Cr. App. 1986), *Benson v. State,* 661 S.W.2d 708 (Tex. Cr. App. 1983), *Ortega v. State,* 668 S.W.2d 701 (Tex. Cr. App. 1983), *Garrett v. State,* 749 S.W.2d 784 (Tex. Cr. App. 1986) (opinion on rehearing), *Arceneaux v. State,* 803 S.W.2d 267 (Tex. Cr. App. 1990), and *Nickerson v. State,* 782 S.W.2d 887 (Tex. Cr. App. 1990), stand for the proposition that sufficiency of the evidence "be measured against the jury charge, which we interpret to mean the entire charge. [footnote omitted]" *Garrett* page 802.

True, we did measure sufficiency solely from the application paragraph in *Garrett,* 749 S.W.2d 784, and *Nickerson,* 782 S.W.2d 887, but, as explained in those cases and others cited in *Nickerson,* this is the proper analytical procedure when the application paragraph increases or heightens the States burden of proof and the State, either

silently of overtly, acquiesces in that heightenment. In *Garret* this occurred when the State's theory of guilt rested entirely on the doctrine of transferred intent, the application paragraph did not mention or allude to the doctrine of transferred intent, the charge instructed the jury on that theory *after* the application paragraph, but the application paragraph instructed the jury to base its verdict only on the law given *before* the application paragraph. Thus the State accepted the burden of proving the defendant's guilt without the benefit of the law of transferred intent, since the jury was specifically instructed to reach a verdict without considering the law of transferred intent. In *Nickerson* the State's theory of guilt rested entirely on the law of parties, the charge instructed the jury on the law of parties in the abstract portion of the charge, the first of two application paragraphs did not mention or allude to the doctrine of parties and facially required that the defendant be convicted as a principal, the second/alternative application paragraph misapplied the law of parties and required that the defendant be convicted as a principal. While we could have silently applied the law of parties to the first application paragraph and found the evidence sufficient, we instead found that the attempted application of the law of parties in the second application paragraph demonstrated that the first application paragraph stood alone and offered the State's theory of the case that the defendant was guilty as a primary actor. Thus the State accepted the burden of proving the defendant's guilt without the benefit of the law of parties in either application paragraph.

Thus *Garrett* and *Nickerson*, upon closer scrutiny, are not meant to support the proposition that in *all* cases we will look solely to the application paragraph in determining sufficiency.

This cause *sub judice* is factually different from *Garrett, Nickerson,* and *Jones v. State,* ——S.W.2d—— (Tex. Cr. App. No. 937-89, MRH denied this day). Here the law of parties is contained in the abstract portion of the charge and thus, along with the rest of the contents of the abstract portion of the charge, is presumed considered by the jury when they follow the instructions in the application paragraph since there is nothing in the charge to suggest otherwise (such as wording in the application paragraph that heightens the State's burden as when applying the law to the facts. There was "no way in *Garrett* and *Nickerson*).[1] Moreover, in both *Garrett* and *Jones,* the abstract charges on the theories of transferred intent and the law of parties came *after* the application paragraph which had specifically directed the jury's attention to the *preceding* instructions in the charge [ ] the application paragraph . . . [could] be construed to refer to the abstract definition, . . . even 'reading the charge as a whole' . . ." *Garrett,* 749 S.W.2d at 789, n. 6. In this cause, there is no language in the jury charge limiting the jury's consideration of abstract definitions to only the "preceding" or "foregoing" instructions in the charge. Thus I would hold the evidence sufficient con-

1. If the majority's idea is that an application paragraph that facially contains a State's theory of guilt as a primary actor holds the State to a higher burden of proof than an application paragraph that facially contains a State's theory of guilt as a party, then at least we are closer to a meeting of the minds in this matter. Still, because of the nature and character of the court's charge I believe the majority would be wrong in that idea. The jury is supposed to consider the charge as a whole unless misinstructed to do otherwise, and thus, from a sufficiency standpoint, unless the state otherwise evidenced an intent that the application paragraph have a particular or narrowed meaning, we too should consider the charge as a whole in considering whether the jury's verdict was a rational one. *Jackson v. Virginia,* 443 U.S. 307, 99 S. Ct. 2781, 61 L.Ed.2d 560 (1979).

sidering the charge as a whole. Because the majority holds otherwise, I dissent.

Miller, Judge

En banc
Delivered: September 18, 1991
Publish

Petition For Discretionary Review from the Twelfth Court of Appeals (Smith County)

NO. 896-89,

DANIEL WAYNE WALKER,
Appellant,

v.

THE STATE OF TEXAS,
Appellee

DISSENTING OPINION ON STATE'S PETITION FOR DISCRETIONARY REVIEW

For the reasons set forth in my dissenting opinion in Ex parte Haron Stephens, 806 S.W.2d 812 (Tex. Cr. App. 1991), I dissent to the entry of the order of acquittal.

McCormick, Presiding Judge

(Delivered September 18, 1991)
En Banc
Publish

Petition For Discretionary
Review from the Twelfth
Court of Appeals
(Smith County)

NO. 896-89,

DANIEL WAYNE WALKER,
Appellant

v.

THE STATE OF TEXAS,
Appellee

DISSENTING OPINION ON STATE'S
PETITION FOR DISCRETIONARY REVIEW

For the reasons set forth in my dissenting opinion in Jones v. State, ——S.W.2d—— (#937-89, Tex. Cr. App., June 26, 1991) (motion for rehearing overruled this day), I respectfully dissent to the majority opinion.

WHITE, Judge

(Delivered September 18, 1991)
En banc
Publish

APPENDIX C

OFFICIAL NOTICE

COURT OF CRIMINAL APPEALS

October 23, 1991

COA #: 12-87-00158-CR
RE: Case No. 0896-89
STYLE: Walker, Daniel Wayne

On this day the State's Motion for Rehearing filed by the State Prosecuting Attorney was denied.

PRESIDING JUDGE McCORMICK & JUDGES MILLER & WHITE WOULD GRANT.

Thomas Lowe, Clerk

Court of Criminal Appeals
P. O. Box 12308, Capital Station
Austin, Texas 78711

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